Supreme Court of the United States.

No. 141.—December Term, 1865.

JAMES G. BARROWS, Plaintiff in Error,

Against

GRANVILLE L. KINDRED, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

O. H. BROWNING for Defendant in Error.

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Statement of Case.

This is an action of ejectment brought by the plaintiff in error, against the defendant in error, to recover the southeast quarter of section two, in township one south, of range four west of the fourth principal meridian, situated in the county of Brown and state of Illinois.

The suit was commenced on the 21st of May, 1861.

On the 14th of June, 1861, the defendant filed the general issue plea, and on the 18th of June, 1863, a trial was had and verdict and judgment rendered for the defendant.

On the 12th of June, 1858, the plaintiff in error had commenced an action of ejectment in the same court (the Circuit Court of the United States for the Southern District of Illinois) against one Jas. R. Gordon, for the same land, which was tried and judgment rendered for the defendant, Gordon, on the 6th of June, 1858.

This last mentioned judgment was acquiesced in by the plaintiff in error, and still stands in full force, in no way reversed, amended, or set aside.

After this judgment was rendered, and had been acquiesced in by the plaintiff in error for ~~more than~~ two years, to wit: on the 11th day of November, 1860, Gordon leased the land in controversy to the defendant in error, Kindred, to hold for three years from March 1st, 1861, and he, Kindred, was in possession of the land as Gordon's tenant, holding under said lease. at the commencement of this suit.

On the trial of this cause, after the plaintiff in error had deduced title to the land in controversy from the patentee of the United States, the defendant, Kindred, proved that he was the tenant of Gordon, the defendant in the former action of ejectment, and that, on the trial of the suit against Gordon, the plaintiff deduced, or endeavored to deduce, title from the same patentee, under whom he now claimed, and gave the record, proceedings, and judgment in that suit in evidence in bar to a judgment in this suit against him, Kindred.

The court held that the record of the proceedings and judgment in the former suit against Gordon, the landlord, together with the evidence which was given in connection with it, constituted a bar, under the statutes of Illinois, to a judgment in this case against Kindred, the tenant.

Brief for Defendant in Error.

The only question now presented for the consideration of the court is, Whether a former trial, verdict, and judgment between the same parties, or their privies, for the same land and the same interest in the same land, are a bar under the statutes of Illinois regulating the action of ejectment?

The statute of Illinois abolishes the fictions in the action of ejectment, but provides that the action itself shall be retained, and that it may be brought "in the same cases in which a writ of right may now be brought by law to recover lands, tenements, or hereditaments, and by any

person claiming an estate therein in fee or for life, either as heir, devisee, or purchaser."

Rev. Stat. Ills. 1845, page 204, § 1 and 2.

By the 8th section of the same act, page 205, the plaintiff is required to state in his declaration "whether he claims in fee, or whether he claims for his own life or the life of another, or for a term of years, specifying such life or the duration of such term."

Prior to the passage of this act there was no statute in Illinois regulating real and mixed actions. They all stood as at common law.

At common law, and consequently in Illinois prior to the statute, the action of ejectment was only a possessory action and did not bring in controversy the fee to the land.

The writ of right could be brought only for the *fee simple* and not for any less estate.—3 B. C., 193.

Since the statute, when the fee simple is claimed in the declaration the ejectment becomes the substitute for the writ of right—performs the functions and takes on it the attributes of that writ, and becomes also subject to all the incidents and consequences of that form of action, one of which is the conclusiveness of its judgments.

We, therefore, submit the following propositions as deducible from the law as it now stands:

1. By abolishing the fictions in ejectment, and requiring the action to be brought by and against the real parties, it was placed upon a footing, as to the force and effect of its judgments, with all other actions; and a trial and judgment in such case would, necessarily, have the force and effect of an estoppel, whether the statute expressly declared such effect or not.

After issue once joined in a writ of right, the judgment

is absolutely final; so that a recovery had in this action may be pleaded in bar of any other claim or demand.

Roscoe on Real Actions, 5, 213, 330.
3 B. C., 194. Coke Litt., 295 *b*.
1. Bac. Ab., 48. Miles vs. Caldwell, 2 Wal., 41.

2. But the statute has, in express terms, given to the judgment in ejectment the same conclusive effect as evidence under the general issue that a judgment in a writ of right would have if pleaded in bar.

The 17th section of the act entitled "Ejectment," Rev. Stat. of Ills, 1845, 206, provides that the defendant shall plead the general issue only, and that on the trial he may give in evidence, under such plea, any matter which, if pleaded in the present writ of right, or action of dower, would bar the action of the plaintiff.

And the 29th section, page 208, provides that "Every judgment in the action of ejectment, rendered upon a verdict, shall be conclusive as to the title established in such action, upon the party against whom the same is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action, subject to the exceptions hereinafter named."

Similar statutes exist in a number of the states, and the following cases decided under them are referred to.

Gibbon vs. Manly, 15 Ills. Rep., 140.
Frazer vs. Weller, 6 McLean, 12.
Beebee vs. Elliott, 4 Barb., 457.
Marvin vs. Dennison, 1 Blatch., 160.
Edwards vs. Roy, 18 Vt. Rep., 478.
Simms vs. Smith, 19 Geo. Rep., 124.
Wood vs. Jackson, 8 Wend., 35.
Hall vs. Dodge, 38 N. H. Rep., 351.
Chamberlain vs. Carlisle, 26 N. H., 540.
Miles vs. Caldwell, 2 Wal., 44.
Blanchard vs. Brown, MS.

3. The object of the statute is to put an end to litigation and give repose to society by preventing the same precise question from being twice litigated between the same parties or their privies; and, in applying the statute, the court looks to the *claim* of the party and the *issue joined* upon it, and not to the accidents of the trial, to determine whether the first judgment is a bar to a second suit.

Here the claim is the same in both suits—the ownership of the land in fee; and the plea was the same—the general issue, which puts in issue the title to the land only.

By the law of Illinois, passed in 1855, and to be found in 1 Purple's Revised Statutes, 513, it is enacted that, on the trial of an ejectment, the plaintiff shall not be required to prove that the defendant was in possession of the land at the time of bringing the suit, unless the defendant, by *special plea*, denies that he was in possession; and the plea of not guilty shall not put in issue the possession of the premises.

The *title*, therefore, was the only thing in issue; and the rule is that when a matter is *once put in issue* the verdict and judgment, whilst they stand, estop the parties from retrying the same issue.

And the effect is the same, whether the parties were prepared for trial or not. The force of the judgment, as an estoppel, is in no degree impaired by the failure of the plaintiff to produce evidence to support his claim.

Marriott vs. Hampton, 7 D. & E., 265.
Bateman vs. Wilcox, 1 Sch. & Lef., 204.
Le Guen vs. Governeur & Kemble, 1 Johns. Ca., 495.
White vs. Ward, 9 Johns., 232.
Grant vs. Button, 14 Johns., 377.
Gaines vs. Hennen, 24 How., 621–22.
Outram vs. Morewood and wife, 3 East., 346.
Eastman vs. Lawes, 5 Bing. N. C., 451.

Here the plaintiff is the same—the defendant in the second suit is the tenant of the defendant in the first suit; the land sued for is the same, the interest claimed in it the same, the plea the same, putting the title, and that only, in issue in both suits.

The judgment in the first suit was acquiesced in until, under the statute, it became conclusive of the rights of the parties; and it now stands, and ought to stand, as an effectual bar to any further litigation of the matter between these parties.

O. H. BROWNING,
For Defendant in Error.